

Tracing the steps towards same-sex union recognition and marriage in Canada

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Aim and Methodology

Aims and Objectives

This dissertation shall examine by means of a literary review, the road to same-sex union equality, by tracing the steps, on both provincial and federal levels, which have led to the eventual recognition of same-sex relationships throughout Canada. The dissertation aims to demonstrate the initial recognition of inequality by the campaigners, followed by the judiciary and finally Parliament. It shall then examine the judicial decisions and parliamentary action over many years which has affected this area of law.

Criteria for Inclusion

Since this is a relatively contemporary topic, much of the information referred to in this dissertation is very recent and therefore cannot be found in even the most recent books. For this reason the most up-to-date account of the law took the form of case law due to the abundance of reported litigation. This is also the most appropriate information since the much of the road to equality passes through the judiciary. By focusing on a foreign jurisdiction it was also useful to utilise the many websites available on the topic, which in turn pointed towards other papers, journals and books which were used to varying extents.

Search Strategy

As mentioned, the abundance of data used in the dissertation comes from court reports. I found Westlaw to be the most appropriate tool for obtaining relevant case law, since the majority of judgments are both recent and of a foreign jurisdiction. One problem which was overlooked was that some of the judgments come from the French speaking province of Quebec. Due to the fact that some judgments run into over 100 pages, paying for someone to translate each case from paper journals was out of the question financially. However, text could be copied from the Westlaw directory and pasted in Google's online translator for free. Although this was met with reasonable success, it is still a limiting factor on the accuracy of some of the dissertation. For one of the most recent cases I managed to contact the barrister representing the appellants, and she duly furnished me with her English translation of

the judgment. This was obviously a more appropriate and accurate method, but took a considerable amount of time to organise via email.

There are many websites devoted to the recognition of same-sex relationship recognition which I found by simple keyword searches through Google and MSN. The two most useful were organised by Egale Canada and SameSexMarriage Canada. They offered an invaluable starting point for much of my research. One problem that I did find was that I became overly reliant on the websites to the extent that I focused solely on the issues contained within their directories' for the first few weeks of drafting.

Arrangement of Literature

Due to the incremental changes which have occurred in this area of law over the years, the dissertation shall take the form of a chronological analysis of the main landmarks in the last 140 years or so (although much of the dissertation focuses on the last 10 years). I felt this to be the most appropriate method of arrangement since in order to understand the reasons for a judgment or introduction of legislation, it is necessary to be aware of the existing legal standpoint. In most cases, the date referred to is the judgment date. The research was abundant with problems initially due to the fact that much of the litigation in the provinces occurred at the same time, therefore it was necessary to focus solely on dates which had significant legal repercussions.

‘The law does not prohibit marriage by homosexuals provided it takes place between persons of the opposite sex’

[Layland v. Ontario (Minister of Consumer & Commercial Relations) 14 O.R. (3d) 658]

Chapter 1

Introduction

Equality is one of the fundamental rights in any modern democracy, without which a real democracy would never exist. However, in order for any inequality creases to be ironed out of society, it must be acknowledged that there actually is inequality in the first place.

In many Western countries throughout the world same-sex couples have campaigned for many years to obtain what they feel are basic human rights, the right to have their relationship recognised by law and the right to marry. With homosexuality only becoming decriminalised in the late sixties, same-sex couples in Canada found that the Federal Government were doing their utmost to avoid addressing any inequalities that existed in the way same-sex couples were treated by society and the law.

However, with the advent of modern ‘Bill of Rights’, the campaigners have had a new weapon in the fight for same-sex union recognition...the judiciary. Unlike Parliament, the judiciary cannot ignore their plight completely.

The fundamental principle that marriage should be between one man and one woman has existed in Canada even before Confederation, which occurred in 1867. This principle was considered so clear and remained undisputed for so long that it was never included specifically in Federal law. As far back as 1866 in Ontario, it was held by a Court that marriage is the ‘lawful union of one man and one woman.’¹

With the introduction of the Canadian Charter of Rights and Freedoms,² there is a greater opportunity for the people of Canada to challenge its laws.³ The Charter

¹ Hyde v Hyde All E.R. 175 (1866)

² Canadian Charter of Rights and Freedoms, enacted 1982

forms part of the Canadian Constitution, which is important since it is required that any legislation (whether federal or provincial) must be consistent with the Constitution and therefore the Charter. Section 15 of the Charter provides that ‘every individual...has the right to equal protection and equal benefit of the law without discrimination.’⁴ However this apparent guarantee of rights and freedoms has a very important condition attached, that the Charter may be relied upon ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and justified society.’⁵ As we will see, it is this section which has proven to be the last hurdle in the race for same sex marriage throughout the provinces in Canada.

³ should a Court find legislation to be inconsistent with the Charter it may declare it invalid by virtue of s.52 of the Constitution Act 1982

⁴ Section 15 Canadian Charter of Rights and Freedoms, this section was not brought into force until April 1985

⁵ section 1 Canadian Charter of Rights and Freedoms

Chapter 2

The beginning of the journey

Layland & Beaulne v Ontario 1993

Since s.15 of the Charter was brought into force in 1985, the concept of same sex marriage was not addressed by a Superior Court until 1993. Two male couples cohabiting in gay relationships in Ontario were refused a marriage license by the office of City Clerk in Ottawa. The employee of the Clerks office told them that should they want to get married they would ‘have to go to Court like the other guys,’⁶ which is exactly what they did. They petitioners accepted that marriage was restricted by common law to opposite sex couples and requested to Court to declare this principle invalid since it was inconsistent with s.15 of the Charter. Interestingly, the intervener in the case, the Metropolitan Community Church of Ottawa, requested a declaration that there was no restriction of marriage to opposite sex couples. However, the divisional Court were not sympathetic to either of their wishes and stated that common law did in fact prohibit the marriage of same-sex couples but this prohibition was not an infringement of their rights under section 15 of the Charter.

On appeal to the Superior Court in 1993⁷ the Court addressed these issues in more detail. The Court found that in a recent case,⁸ the old judgement in *Re North and Matheson* (where it was held that a marriage between a female and a female-to-male transsexual was a nullity) still applied.⁹ However the MCCO presented to the Court that no prohibition on same sex marriage existed. They went on to state that ‘the common law must adapt to reflect changing social realities.’¹⁰ Southey J. commented that in his opinion homosexuals ‘make up a discrete and insular minority.’¹¹ He focused on the fact that procreation is a primary factor of the institution of marriage

⁶ *Layland & Beaulne v Ontario Minister of consumer and commercial relations* 1993 C15711 factum of appellants para 8

⁷ *Layland v. Ontario (Minister of Consumer & Commercial Relations)* 14 O.R. (3d) 658

⁸ *C (L) v C (C)* 1992 10 OR 3(d) 254, 256

⁹ 1974 54 D.L.R.(3d) 280 (Co. Ct. Win.)

¹⁰ *Layland & Beaulne v Ontario Minister of consumer and commercial relations* 1993 C15711 factum of appellants para 27

¹¹ para 13 *Layland v. Ontario (Minister of Consumer & Commercial Relations)* 14 O.R. (3d) 658

and that the restriction to opposite sexes exists since procreation ‘cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union.’¹² The appeal failed on these grounds.

Canada (Attorney General) v Mossop 1993

In the Federal case of *Canada (Attorney General) v Mossop*,¹³ a man was refused bereavement leave to attend the funeral of his male partner’s father on the basis that their partnership did not constitute ‘immediate family’, as required by his employment agreement.¹⁴ This agreement included a common law spouse as immediate family, however at article 2.01(s) it detailed that the common law spouses must be of opposite sex. Interestingly, there was no consideration of any breach of the Charter in this case (as in *Layland v Ontario*¹⁵), they instead based their challenge on the Canadian Human Rights Act.¹⁶ The Act prohibits discrimination on the grounds of ‘family status’, which is not defined by the Act. LA Forest J. held that he did not feel that the use of ‘family status’ to describe a same-sex relationship had reached an adequate status in language to give it legal effect, and could therefore not give effect to the Canadian Human Rights Act.¹⁷

Here we have seen two very different legal approaches to try and achieve the same result, however the Charter does technically carry a little more legal weight since it is part of the Constitution and therefore a ‘Bill of Rights’.

Egan v Canada 1995

The Supreme Court decision in *Egan v Canada*¹⁸ which followed the previous two cases was a turning point in the way which s.15 of the Charter was interpreted. Here the appellant had been refused a spouse’s allowance under the Old Age Security Act

¹² ibid para 18

¹³ [1993] 1 SCR 554

¹⁴ The agreement was a collective agreement between the Treasury Board and the Canadian Union of Professional and Technical Employees

¹⁵ *Layland v. Ontario (Minister of Consumer & Commercial Relations)* 14 O.R. (3d) 658

¹⁶ R.S.C. 1985, c. H-6 (S.C. 1996-97 c.33 as amended)

¹⁷ interestingly, they chose to challenge to alleged breach on s.3(1) of which one of the grounds is ‘family status’. However in the same section there is the ground of ‘sexual orientation’ which would perhaps have been just as effective.

¹⁸ [1995] 12 R.F.L. (4th) 201

on the basis that the Act specified that his spouse must be of the opposite sex.¹⁹ The appellant had challenged the definition of ‘common law spouse’ in the Federal Courts, arguing that it was contrary to s.15 of the Charter. In both instances the lower Courts held that this requirement was not discriminatory under s.15. When the appeal reached the Supreme Court it was held by a narrow majority that the requirement did breach amount to discrimination but failed to satisfy the part of the s.15 test which requires that the distinction is drawn on an irrelevant personal characteristic. The Court held that since same-sex couples cannot meet the purpose which Parliament intended by the use of the opposite-sex definition (namely procreation), then the claim must fail since this is not ‘irrelevant’. It was also considered that even if a breach of s.15 had been completely satisfied it would have been justified by s.1 anyway since the Court felt that ‘it is not realistic for the Court to assume that there are unlimited funds to address the needs of all. It is legitimate for a Government to make choices between disadvantaged groups and it must be provided with some leeway to do so.’²⁰ Although the appeal was rejected, there was at least a recognition at last that sexual orientation is an analogous ground for discrimination²¹, and that the opposite sex definition of spouse does amount to discrimination.

Yarrow Case 1996

In 1996, circumstances similar to those in Mossop²² arose, when a man named Stephen Yarrow was refused bereavement leave in order to attend the funeral of his same sex partner.²³ As discussed earlier, the bereavement leave only extends to opposite sex common law spouses. However, on the 6th February 1996, the Public Service Staff Relations Board ruled that this refusal of leave was discriminatory and that the collective agreement should shed the words ‘of the opposite sex’ in its definition of ‘common law spouse’.

M v H 1996

¹⁹ R.S.C. 1985 s.2 this was the interpretation section which defined spouses as ‘opposite sex’

²⁰ per Sopinka J. Egan v Canada [1995] 12 R.F.L. (4th) 201

²¹ s.15 of the Charter focuses the Courts attention to certain grounds which constitute discrimination

²² Canada (Attorney General) v Mossop [1996] 1 SCR 554

²³ referred to as the Yarrow case. Board file 166-2- 25034

The first real application of the judgement in Egan arose in Ontario in the case of *M v H*.²⁴ The question arose here of whether exclusion of same sex partners from the definition of ‘spouse’ in the Family Law Act²⁵ amounted to a breach of their rights under s.15 of the Charter. Epstein J.’s main observation was that the Act made a distinction between same sex and opposite sex couples and therefore must be discriminatory by its very nature. Epstein J. therefore held that Part III of the Family Law Act was an infringement of s.15 of the Charter. However, this principle had already been established in Egan, the main issue was its alleged justification by the Attorney General under s.1 of the Charter. The test for s.1 to apply is that;

- 1) the objective of the legislation must be pressing and substantial and;
- 2) there must be proportionality between the gain achieved by the public interest served by the legislation and the harm done to the interest of the person or group whose right is infringed²⁶.

‘Section 1 recognizes the inevitable tension between the unimpeded exercise of individual rights and the pursuit of broader societal purposes.’²⁷ One of the main issues in deciding whether or not section 1 applies is legislative purpose. For defining the purpose of the FLA, Epstein J. used the Report on The Rights and Responsibilities of Cohabitants Under the Family Law Act (Report).²⁸ Epstein J. points out that this report considers the FLA to be used as a resolution in economic disputes where the relationship between financially interdependent individuals breaks down. However, establishing the general purpose of the Act does not in itself satisfy the test grounds for section 1. Epstein J. states that ‘no one contends in this case that the objective of the Legislature is not pressing and substantial. The crux of the debate in this case lies in the proportionality test.’²⁹ As mentioned earlier, there must be a balance between the public interest that the legislation is trying to protect, and the harm to the person whose rights are infringed by the legislation. In addressing this balance Epstein J. stated that she had ‘been unable to identify any evidence to support the proposition that the exclusion of same-sex couples would further the objectives of the

²⁴ *M v H* [1996] O.J. No. 4419

²⁵ Part III, R.S.O. 1990 c.F 3

²⁶ *M v H* [1996] O.J. No. 4419

²⁷ *M v H* [1996] O.J. No. 4419 para 80

²⁸ published by the Ontario Law Reform Commission (OLRC) in 1993

²⁹ *M v H* [1996] O.J. No. 4419 para 108

legislation'³⁰ and that the proportionality part of the section 1 test could not be satisfied. Epstein J. came to the conclusion that the exclusion of same sex couples from the definition of spouse in the FLA had 'not been demonstrably justified by the proponents of the legislation. The exclusion is not rationally connected to the legislative objectives.'³¹ She ordered that the opposite sex requirement be removed from the definition of spouse and that the words 'two persons' should be inserted.

Moore v Canada (Treasury Board) 1996

On June 13th 1996, the Canadian Human Rights Tribunal ordered the Federal Government to provide equal benefits for its gay and lesbian employees by amending all its legislation and directives containing an opposite-sex definition of spouse.³² However, the Government's response was considered inappropriate because it required employees to declare that they were in a homosexual relationship in order to qualify for a separate scheme for 'same sex partner relationships'.³³ This of course was discrimination in its most obvious form since it set up a different plan for homosexuals. John Fisher of Egale explained that 'the Government's approach was offensive because it created a separate classification scheme for gays and lesbians and required employees to declare their homosexuality before benefits would be granted.'³⁴ The scheme actually required that the homosexual relationship be declared 'publicly'.

However, On April 10th 1997, the Tribunal ruled that this separate plan was not good enough and that instead they must redefine relationships so that no distinction is drawn on the basis of gender or sexual orientation.³⁵

By August 1997 a memorandum from the Treasury Board was distributed amongst all Federal Directors of personnel and Chiefs of Staff, explaining that they must now

³⁰ M v H [1996] O.J. No. 4419 para 128

³¹ M v H [1996] O.J. No. 4419 para 130

³² Moore v Canada (Treasury Board) [1996] 96 C.L.L.C. 230-037 this case involved a challenge against the Treasury board for discrimination on grounds of sexual orientation under the Canadian Human Rights Act.

³³ The plan took the form of a memorandum containing the definition 'a "same-sex partner" relationship exists when, for a continuous period of at least one year, an employee has lived with a person of the same sex in a homosexual relationship, publicly represented that person to be his/her partner and continues to live with that person as his/her partner.'

³⁴ Egale press release 10th April 1997 'Opposite-sex definition of spouse discriminatory, adjudicator rules'

³⁵ Moore v Treasury Board [1997] 97 C.L.L.C. 230-037 the Tribunal specifically required that the opposite sex requirements be removed, and not merely added to.

interpret ‘common law spouse’ in collective agreements as if the words ‘of the opposite sex’ were not included.³⁶ Although this was a major victory for all Federal employees in same sex relationships, the Government also announced that it intended to challenge the case which required them to make the amendment.³⁷

Changing the FLA in British Columbia 1996

Interestingly, the Government of British Columbia had passed legislation on a similar matter just two months earlier. The provincial Family Relations Act was amended so that same sex couples could benefit from the definition of spouse, which then entitled them to rights and responsibilities for custody and access.³⁸ So as the Federal Government was dragging its heels, British Columbia and Ontario appeared to be making genuine attempts at creating equality for same sex couples.

Kane v Ontario 1997

In October 1997 judgement was passed in Kane v Ontario.³⁹ This concerned another alleged breach of s.15 of the Charter in the form of an opposite sex specific definition in the Insurance Act.⁴⁰ The Attorney General had conceded in his factum that s.15 had in fact been infringed, but wished to rely on section 1 with reference to Egan.⁴¹ The Attorney General also urged the Court to consider that M v H⁴² had been wrongly decided and that it was under appeal. However, Coe J. stated that ‘the exclusion of same sex couples from the definition referred to does not constitute a reasonable limit as can be demonstrably justified in a free and democratic society.’⁴³ He stated that the exclusion of same sex couples from the definition of spouse did not add ‘anything meaningful’ to the scheme. The precedence offered by Egan was not accepted since the commercial insurance coverage costs involved in the present case were of a different nature to the costs at hand in Egan. Coe J. declared the offending section of the Insurance Act should be altered ‘in accordance with the request of the applicant.’⁴⁴

³⁶ Moore v Treasury Board [1997] 97 C.L.L.C. 230-037

³⁷ Egale press release August 20th 1997 ‘federal Government extends definition of spouse but appeals tribunal ruling’

³⁸ notice the similarity to M v H in Ontario which forced the FLA to be altered

³⁹ [1997] O.J. No. 3979

⁴⁰ R.S.O. 1990 c. I. 18 (in the act s.224(1) contains the definition)

⁴¹ Egan v. Canada, [1995] 2 S.C.R. 513 (S.C.C.)

⁴² M v. H (1996), 31 O.R. (3d) 417 (Ont. C.A.),

⁴³ [1997] O.J. No. 3979 para 14

⁴⁴ ibid para 27

As we can see there appears to be a continuing recognition that opposite sex specific definitions of spouse are discriminatory under s.15 of the Charter. However it is only in the more recent, and perhaps in decisions of less national interest (i.e. not marriage), that the Courts are willing to declare that section 1 of the Charter may not be relied upon. However, the tests attached to section 1 appear to be gradually given a narrower application by the Courts.

Chapter 3

Recognition or not?

Prime Minister comments on same-sex union recognition 1999

In January 1999, after an Egale news conference on same sex relationship recognition, the Prime Minister was asked ‘whether it was true that his Government was planning to extend equality to same sex couples in all federal laws.’⁴⁵ He responded by saying ‘I don’t know whether legislation is needed.....it’s not on the agenda at this time.’⁴⁶ This enraged the gay and lesbian community since all their efforts up until this time aimed at bringing to light the inequalities faced by same-sex couples seemed to have gone unnoticed by the Federal Government. As John Fisher of Egale stated ‘if the Prime Minister says he doesn’t know whether legislation is needed then frankly, he’s out of touch.’⁴⁷

Bill 32 in Quebec 1999

On the 10th June 1999 at 9.30pm, the Quebec Government became the first province to treat same sex spouses equally with common law spouses.⁴⁸ This advancement in the recognition of same sex unions occurred when the Government unanimously passed Bill 32, which changes the meaning of ‘spouse’ in 39 provincial laws and regulations. In fact it ‘explicitly includes the notion of same-sex common-law spouses.’⁴⁹ The purpose of the Bill is best described by its explanatory note;

‘This Bill amends the Acts and regulations that contain a definition of the concept of de facto spouse to allow de facto unions to be recognized without regard to the sex of the persons concerned.’

⁴⁵ Egale press release January 20th 1999 ‘PM waffles on Same-sex equality’

⁴⁶ statement of PM taken from Egale press release January 20th 1999 ‘PM waffles on Same-sex equality’

⁴⁷ Executive Director of Egale, Egale press release January 20th 1999 ‘PM waffles on Same-sex equality’

⁴⁸ reported by Egale in a press release June 11th 1999 ‘Quebec changes the definition of spouse in 39 laws and regulations’

⁴⁹ Justice Quebec fact sheet from www.justice.gouv.qc.ca/english/publications/generale/sexe-a.htm

Carmen Paquette of Egale said ‘the passage of this Bill marks another giant leap forward in the struggle for equality.’⁵⁰ John Fisher of Egale also commented on this legal triumph by adding that ‘the federal Government has run out of excuses. It must introduce an omnibus Bill to treat same sex couples equally.’⁵¹ With the Quebec Government on their side, the same sex recognition campaign groups such as Egale had much to celebrate with the passing of Bill 32. It was the first real legislative assault by a province at addressing the inequalities in current legislation.

Changing the FLA in Ontario 1999

Not long after the long-awaited triumph in Quebec, the Ontario Government attempted to address the same issue via the legislature following the decision in *M v H*. In this case the Court had ordered that the definition of spouse in the FLA must be changed by November 1999. On October 28th 1999, the Ontario Government passed the omnibus legislation, but its methods in achieving the desired result caused some distress. The Government had still restricted ‘spouse’ to opposite sex couples, while creating a new and separate definition to cover same sex ‘partners’. This differs from the approach the Quebec Government offered which included same-sex couples in the existing definition of spouse. The Ontario Government’s approach was frowned upon due to the fact that it ‘sends a clear message that same-sex relationships are qualitatively different than opposite-sex relationships.’⁵² This approach by the Government was also unusual in that it conflicted with the previous judgement in *Attorney General of Canada v Moore & Akerstrom*, where it was held that it is discriminatory to create a separate definition for same sex partners. Laurie Arron of Egale stated that the new definition ‘does not conform with the Supreme Court decision, and may invite further legal action.’⁵³

⁵⁰ Executive member of Egale in a press release June 11th 1999 ‘Quebec changes the definition of spouse in 39 laws and regulations’

⁵¹ *ibid* Executive Chairman of Egale

⁵² Laurie Arron, President Egale, Press release October 25th 1999 ‘Ontario introduces omnibus legislation, refuses to extend definition of spouse’

⁵³ *ibid*

Chapter 4

Gaining Government Support

Attorney General of BC supports same-sex marriage 2000

In May 2000 the Attorney General of British Columbia issued a statement expressing that he supports the right of same-sex couples to marry.⁵⁴ This is the first ever occurrence of a Canadian Government statement supporting same-sex marriage. The statement was issued after an Egale board member and her partner applied for a marriage license in B.C. Andrew Petters, the Attorney General, stated that he would deliver a legal opinion as quickly as possible in order to ascertain whether or not a license could be granted. He urged the federal Government to ‘resolve the matter by clarifying its legislation and offering same-sex couples the same opportunity to marry as is available to heterosexual couples.’⁵⁵ The basis of the statement was in light of recent challenges to the existing law with regards to the Charter.⁵⁶ He also commented that ‘in a modern society there is no justification for denying same-sex couples the same option to form marital bonds as are afforded to opposite-sex couples.’⁵⁷ It now appeared that the Governments of Canada (on a provincial level at least) were beginning to unite with same-sex recognition campaigners and recognising the need for change in Canadian legislation.

Bill C-23 changes same-sex union benefits and obligations at federal level 2000

By early summer 1999 a piece of legislation passed through Parliament which was set to change benefits and obligations available to all same-sex couples at a federal level.⁵⁸ Bill C-23 was introduced to effectively extend the definition of common law spouse to all couples in a conjugal relationship, not just those of the opposite sex. This differed from the Quebec approach in Bill 32 and the changes made to the FLA in Ontario following *M v H* in which the changes were aimed directly at creating rights and obligations for same-sex couples. The preamble of Bill C-23 specifically mentions that this is to reflect values consistent with the Charter. Initially the word

⁵⁴ reported by Egale, May 29th 2000 ‘B.C. makes history: Supports same-sex couples’ right to marry’

⁵⁵ *ibid* Andrew Petters Statement on same sex marriages

⁵⁶ In particular *Egan, M v H* and *Kane v Ontario*

⁵⁷ reported by Egale, May 29th 2000 ‘B.C. makes history: Supports same-sex couples’ right to marry’

⁵⁸ previous challenges such as in *Moore v Canada* (Treasury Board) had been restricted to employees of the federal Government

‘conjugal’ cause some MP’s concern in March 2000 when they were unsure of its interpretation within the Bill. In a fact sheet produced by Egale it was found that the criteria used to establish a conjugal relationship included shared shelter, sexual and personal behaviour, services, social activities, economic support and the social perception of the couple.⁵⁹ These criteria were reaffirmed in *M v H* where it was held that the criteria required to establish a same-sex relationship were identical to that of an opposite-sex relationship.⁶⁰ As we can see from this criteria, most same-sex relationships would qualify so long as there is a degree of ‘emotional intimacy.’⁶¹ Bill C-23 received assent on June 29th 2000 and is now the Modernization of Benefits and Obligations Act. In the first part of the Act however, it is made clear that nothing contained within the Act alters the meaning of ‘marriage’ which still remains a union between one man and one woman.⁶² The main bulk of the Act amends various existing provisions to include same-sex conjugal relationships where benefits and obligations are conferred to a common law spouse. For example in the Canada Pension Plan⁶³ the existing opposite-sex definition was repealed in s.42, and instead a subsection added which provides a non-sex specific definition of ‘common law spouse.’

B.C. Government announces support of same-sex marriage 2000

Following the Attorney General of B.C.’s statement in May 2000 which demonstrated his support of same-sex marriage⁶⁴, the B.C. Government issued its own statement in July 2000 detailing that it would initiate legal proceedings to challenge restrictions on the right of same sex couples to marry.⁶⁵ This follows the Attorney General’s issuing of a further statement on the current legal situation on same-sex marriage in B.C, that same-sex marriage is still unavailable, although in his view this prohibition is unconstitutional. It must be noted that only the federal Government has the jurisdiction to change the definition of marriage,⁶⁶ and that the B.C. Government is now backing its gay and lesbian citizens to ensure equality is achieved.

⁵⁹ Bill C-23 and conjugal relationships, Egale Fact sheet March 2000

⁶⁰ *M v. H* (1996), 31 O.R. (3d) 417 (Ont. C.A.), para 32 per Charron J. A.

⁶¹ Bill C-23 and conjugal relationships, Egale Fact sheet March 2000

⁶² s.1.1 Modernization of Benefits and Obligations Act

⁶³ R.S. c. C-8

⁶⁴ reported by Egale, May 29th 2000

⁶⁵ Egale press release July 20th 2000

⁶⁶ this requirement is discussed in detail later

Saskatchewan begins road to same-sex union recognition 2001

The smaller province of Saskatchewan embarked upon its same-sex equality mission in May 2001 when it introduced the Miscellaneous Statutes (Domestic Relations) Amendment Act. This legislation was brought into force following the requirements imposed on Governments in *M v H*, and amends 24 pieces of existing statutory legislation. As Egale points out,⁶⁷ the approach of the Saskatchewan Government which uses ‘spouse’ for both same-sex and opposite-sex couples, is more appropriate than the Ontario Government’s method of creating a separate term for same sex relationships.⁶⁸ In an expression of his delight at the new legislation, John Fisher of Egale stated that the Act provided ‘a symbolic affirmation of the equal validity and worth of same-sex relationships.’⁶⁹

⁶⁷ Egale press release 31st May 2001 ‘‘saskatchewan’s miscellaneous statutes (domestic relations) amendment act

⁶⁸ omnibus legislation introduced in Ontario October 1999 to amend FLA

⁶⁹ John Fisher Executive Director Egale, press release May 31st 2001

Chapter 5

Same-Sex Spouses Seem Possible

Egale v Attorney General 2001

A case was brought to the B.C. Supreme Court in July 2001 which was another assault on existing provisions which hindered a same-sex couple from being provided with a marriage license. In *Egale v Attorney General*⁷⁰ the petitioners were refused marriage licenses on the basis that common law did not provide for marriage between same-sex partners. The petitioners sought a declaration from the Superior Court that marriage between same-sex couples is not prohibited by either statute or common law, and that the Court order the Director of Vital Statistics issue the couples with a marriage license. Should the Court be adverse to providing judgement on this matter then they offer an alternative that the Court may at least declare that any prohibition which may exist is contrary to the Charter and therefore unenforceable.⁷¹

In this case the Court examined, in great detail, the existing provisions and the authority of Parliament and provincial legislatures to change the meaning of marriage. The Court first considers the meaning of marriage in common law. It mentions that no federal statute actually defines marriage, therefore it is the duty of the Court to define it via common law. The case of *Hyde v Hyde* (as previously mentioned) features as the first real reference to the opposite sex requirement of marriage, even though it concerned polygamous marriage and not a gender issue.⁷² The Court also considered the meaning of marriage in the Oxford dictionary, and came to the conclusion that in no dictionary was there mention of marriage being between two persons of the same sex. It was for all of these reasons that the Court held that marriage ‘is a lawful and monogamous union of two persons of opposite sex.’⁷³

Once the Court had established that same-sex marriage was not permitted in Canada, they then sought to address the issue of whether or not they could change the common law meaning of marriage. In *R. v Salituro* it was held that ‘complex changes to the

⁷⁰ 2001 BCSC 1365

⁷¹ *Egale v Attorney general* 2001 BCSC 1365 para 2

⁷² *Egale v Attorney general* 2001 BCSC 1365 para 81

⁷³ *ibid* para 88

law with uncertain ramifications should be left to the legislature.⁷⁴ This left the Court the ability to make ‘incremental changes.’⁷⁵ The Court did not feel they had the authority to make the change required since it was ‘much more than incremental,’ since it would affect ‘a deep-rooted social and legal institution.’⁷⁶

For this reason the Court came to the conclusion that it must be the legislature who makes the changes to the legal framework surrounding marriage, therefore they turned their attention to the constitutionality of such a change. The Court explains that the issues here are whether it is Parliament or the provincial legislatures which has the authority to legislate on the matter.⁷⁷ Section 91(26) of the Constitution Act 1867 gives Parliament the sole authority to legislate on matters relating to ‘marriage and divorce.’ The Act confers power to the provinces to legislate on matters of ‘property and civil rights.’ Therefore the Courts were forced to decide whether same-sex relationships were classed as a ‘marriage and divorce’ issue, in which case governed by Parliamentary legislature, or a ‘property and civil rights’ issue which would be dealt with by the provincial legislature. Interestingly the Court proceeded to explain why Parliament would be unable to change the definition either. They said that ‘by attempting to change the legal nature of marriage, Parliament would be self-defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to the power.’⁷⁸ The power is talks about is contained within the Constitution Act 1867⁷⁹ and that any attempt to change the meaning of marriage would effectively be an amendment to the Constitution, which is not permitted.⁸⁰

Eventually the Court held that the characterisation of same-sex relationships did not fall within the meaning of s.91(26). The Court therefore ordered that the petition be dismissed.

In the event that the Courts’ interpretation of the constitutionality of such a change may have been incorrect, the Court looked at any breach of the Charter which the existing provisions may cause. When considering s.15 of the Charter, which prohibits

⁷⁴ [1991] 3 S.C.R. 654 p. 666

⁷⁵ *ibid*

⁷⁶ *Egale v Attorney general* 2001 BCSC 1365 para 92-93

⁷⁷ *ibid* para 98

⁷⁸ *Egale v Attorney general* 2001 BCSC 1365 para 10

⁷⁹ s.91(26)

⁸⁰ unless the process in the Constitution Act 1982 has been adhered to

discrimination on the basis of sexual orientation, the Court stated that the petitioners' case must satisfy 3 tests:⁸¹

- i) Does the law of Canada subject the petitioners to differential treatment?
- ii) Is the differential treatment based on one or more enumerated or analogous grounds in s.15?
- iii) Does the differential treatment discriminate in a substantive state?⁸²

In *Layland v Ontario*⁸³ it was held that the opposite sex requirement did not discriminate against gay and lesbian people, since they were still free to marry so long as it was with a person of the opposite sex. However in satisfying the first condition the Court felt that even though the statement in *Layland* may be technically true it did not distract from the fact that there still remains differential treatment. In answering the second, the Court refers to *Egan v Canada* which concludes that discrimination on the basis of sexual orientation is an analogous ground for the purposes of s.15.⁸⁴ And finally, with regards to the third condition the Court stated that 'there is now sufficient practical similarity between the economic and social consequences of opposite-sex and same-sex relationships that affording one but not the other the opportunity to acquire a legal and formal status discriminates in the substantive sense of the word.'⁸⁵ On the basis that all three of these conditions had been satisfied the Court declared that the petitioners' rights under s.15 of the Charter had been infringed.

As with previous cases, the last barrier to break down was the relentlessly impermeable s.1. The Court explained that it was utmost importance that 'there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement.'⁸⁶ The Attorney General based his argument on this point that the opposite sex requirement is essential in order to 'provide a societal structure for the procreation of children in order to perpetuate Canadian society.'⁸⁷ The Court agreed with the Attorney General in stating that it was 'of the opinion that

⁸¹ *R. v Oakes* (1986) D.L.R. (4th) 200 (S.C.C.)

⁸² *Egale v Attorney general* 2001 BCSC 1365 para 160

⁸³ p666

⁸⁴ 'sexual orientation' is not mentioned specifically in s.15 of the Charter, however it was held in *Egan* that it did amount to an analogous ground for the purposes of the section

⁸⁵ *Egale v Attorney general* 2001 BCSC 1365 para 178

⁸⁶ *ibid* para 184

⁸⁷ *ibid* para 189

the law defining marriage as an opposite-sex relationship is a reasonable limit prescribed by law and is demonstrably justified in the context of the free and democratic Canadian society,⁸⁸ and that ‘the state has a demonstrably genuine justification in affording recognition, preference, and precedence to the nature and character of the core social and legal arrangement by which society endures.’⁸⁹ Once again the goal of equal marriage is shattered at the last moment.

Hendricks & Leboeuf v Attorney General 2001

Meanwhile in Quebec, the case of *Hendricks & Leboeuf v Attorney General*⁹⁰ had reached the Superior Court in Montreal. Unlike in other jurisdictions, this challenge was to the opposite-sex requirement for marriage embodied in statutory law as opposed to common law. The offending statutes were indicated as article 365 of the Quebec Civil Code,⁹¹ Federal Bill s-4⁹² and the recent Modernization of Benefits and Obligations Act. The Attorney General focused his argument on same-sex couples’ inability to procreate, which he considered to bring s.1 of the Charter into action. Judgement of this case was to be delayed due to Quebec’s introduction of new legislation on the subject which is mentioned below.

Quebec proposes Civil Union for same-sex couples 2001

On the 7th of December 2001, the Quebec Government announced the submission to Parliament of a White paper on civil unions (termed ‘registered domestic partnerships’). This was in a response to the *Hendricks-Leboeuf* case passing through the Superior Courts only a little earlier. Unlike other provinces who have sought to defend the institution of marriage completely, the Quebec Government seems to be taking a proactive role in providing for same-sex relationships. For example the introduction of Bill 32 in 1999 which changed the definition of ‘spouse’ in Quebec’s legislation to include same-sex couples. However the Coalition⁹³ expressed its frustration at the proposed separate scheme for same-sex couples, once again

⁸⁸ *Egale v Attorney general* 2001 BCSC 1365 para 199

⁸⁹ *ibid* para 208

⁹⁰ No 500-05-059656-007

⁹¹ this was the basis for the petitioners being refused a marriage license

⁹² this affirms the opposite sex-requirement of marriage

⁹³ La Coalition Québécoise pour le droit au mariage pour les gais et les lesbiennes, the group supporting the *Hendricks-Leboeuf* case

demonstrating the discrimination of gays and lesbians, although it did feel that it was at best a means of civil protection for same-sex partners. Even though some campaigners were angry at this proposal it is worth remembering that the provincial legislatures do not have jurisdiction to open up marriage to same-sex couples, therefore this legislation, if passed, would be the closest legal arrangement to marriage.

Alberta publishes research paper on recognition of same-sex couples 2002

In January 2002, Alberta published a research paper on the recognition of same-sex couples' rights and obligations.⁹⁴ It is admitted that since the M v H judgement, Alberta is one of the only provinces which had not take any legislative action.⁹⁵ At the time of publication it was estimated that around 70 pieces of provincial legislation in Alberta infringed s15 of the Charter.⁹⁶ It was suggested that the Alberta Government would benefit more from changing their legislation as quickly as possible in light of M v H, since many costly Court battles would be likely to ensue otherwise.

Quebec's Bill 84 on Civil Unions is presented to National Assembly 2002

On the 25th April 2002 the new civil union legislation, Bill 84, was presented to the National Assembly by the Government of Quebec. This Bill was based on the Government White Paper presented in December 2001. Bill 84 was unique in that it was a real attempt a giving same-sex couples the obligations and benefits of marriage, or at least to the extent of the provincial legislature. Although the gay and lesbian community still felt that the Government were still missing the whole point, that they wanted equality and not a separate regime. Perhaps in an attempt to suppress this anger toward the isolation felt by same-sex couples due to this separate plan, it also made the Bill applicable to opposite-sex couples who did not wish to marry. In its introduction the Bill states that it creates 'a institution, the civil union, for couples of the opposite or the same sex who wish to make a public commitment to live together as a couple and to uphold the rights and obligations stemming from such status.'⁹⁷ As

⁹⁴ Alberta Law Reform Institute, Recognition of rights and obligations in same-sex relationships, January 2002

⁹⁵ *ibid* p3

⁹⁶ *ibid* p11

⁹⁷ Bill 84 intro

if to emphasise the aim of the Bill for those in doubt as to its true purpose it details that ‘the bill also amends the Civil Code and other legislation to formalize recognition of the new status of civil union spouses, who will have the same rights and obligations as married couples.’ This ambitious piece of legislation was welcomed on the whole, but most still felt cheated at having to settle for anything other than marriage. Interestingly, the omnibus legislation also changes the Quebec Civil Code⁹⁸ so that marriage will be ‘between two persons’ in place of the present ‘between a man and a woman’. This is not doubt due to the forthcoming Hendricks Leboeuf decision, in which judgement had been suspended until passage of the new legislation, where the petitioners request that the opposite sex definition in the Quebec Civil Code be declared invalid.

One of the most important features of the Bill is that it uses the word ‘spouse’, which was normally reserved for those in opposite-sex relationships. The use of the term spouse for both heterosexual and homosexual relationships was also apparent in Quebec’s Bill 32. Of course, the fact that this still is not ‘marriage’ the rights conferred by s.15 of the Charter are relatively unaffected and therefore the Bill will still be open to legal challenge if passed. The Bill also provides for a public ceremony of the union, which gives the impression that the Government really did intend this to be marriage for those who cannot.

Alberta introduces same-sex legislation 2002

Only 2 weeks after Quebec presented Bill 84, Alberta made its ‘small step towards equality.’⁹⁹ This advancement was in light of the research paper published in January 2002 and took the form of two bills designed to give same-sex couples some of the rights and obligations enjoyed by opposite-sex couples.¹⁰⁰ The vehicle for this is a new category of ‘adult interdependent’ relationship. Once again, this by its very nature is discriminatory since it creates a separate scheme for those not conforming to the opposite-sex requirement. In addition, the Bills only amend a few of the 50 or so

⁹⁸ art 365 Quebec Marriage Law

⁹⁹ Egale Press release may 8th 2002

¹⁰⁰ Bill 29 Intestate Succession Amendment Act, Bill 30 Adult interdependent relationships act

Acts which breach the Charter. Bill 30 also makes clear that ‘spouse’ and ‘marriage’ remain an opposite-sex only institution.

Quebec’s Bill 84 on Civil Unions is passed 2002

In June 2002 Bill 84, the Quebec civil union bill, was passed and given the title ‘An Act instituting civil unions and establishing new rules of filiation.’¹⁰¹ The Act briefly outlines that the new unions will be governed by the same rules as marriage, which demonstrates that the Governments intention was plainly to provide a union as close to marriage as possible in order to satisfy same-sex couples and more importantly the Charter. The union is open to anyone over the age of 18 who is not already part in a marriage or civil union. Chapter II details the effects of the civil union and one would be forgiven for thinking it was a marriage act they were reading. Just as included in marriage vows, the civil union requires spouses owe each other ‘respect, fidelity, succour and assistance,’ along with a duty to live together¹⁰² and creates a family connection between each spouse and their respective family members.¹⁰³ Furthermore 521.11 provides that nullity of a civil union has the same effect as nullity of marriage. If this sounds conspicuously like marriage, that’s because I imagine it was designed to.

¹⁰¹ filiation is the term given to relationships between parent and child

¹⁰² An Act instituting civil unions and establishing new rules of filiation Chapter II 521.6

¹⁰³ An Act instituting civil unions and establishing new rules of filiation Chapter II 521.7

Chapter 6

One Final Goal....Marriage

Halpern v Toronto City 2002

On July 12th 2002, the long awaited judgement was given in Halpern v Toronto City.¹⁰⁴ In this case the applicants (eight same-sex couples) wished judicial review of the fact that they were not issued with marriage licenses in summer 2000. There applications for marriage licenses were held in ‘abeyance’ until the City could establish its legal position on the matter. The Court held that the exclusion of same-sex couples from marriage was unconstitutional and discriminatory. In short, Smith A.C.J. stated that ‘the equality provisions of s. 15(1) of the Canadian Charter of Rights and Freedoms were violated by the common law rule that defined marriage as the lawful voluntary union of one man and one woman to the exclusion of all others. The common law definition of marriage could not be saved by s. 1 of the Charter.’¹⁰⁵ The Court declared that the common law definition of marriage was constitutionally invalid and inoperative, and that the declaration would be suspended for 24 months in order for Parliament to be given the opportunity to remedy the problem.

Previous cases had failed on the s.1 provision on the basis that procreation was being protected by keeping marriage exclusively heterosexual. However in Halpern the Court held that this was not the case and that ‘if heterosexual procreation was not essential to the nature of the institution of marriage, then the sexual orientation of same-sex couples was the only distinction differentiating heterosexual couples from homosexual couples regarding access to marriage.’¹⁰⁶ Should Parliament fail to have remedied the problem within the 24 months stipulated by the Court, then the common law definition of marriage would automatically change from ‘one man and one woman’ to ‘two persons’. The reason for the 24 month period to allow Parliament to remedy the problem itself was so that the balance of power would not be upset. The Parliament is the elected representative of the people and should be Parliament that makes such important alterations to the law affecting the people. As opposed to

¹⁰⁴ 28 R.F.L. (5th) 41

¹⁰⁵ ibid Smith A.C.J at p3

¹⁰⁶ ibid

Egale, where it was held that Parliament could not change the definition of marriage since the Constitution Act would not allow it, the present Court found that ‘the word marriage did not of itself limit the ability of Parliament to legislate same-sex marriages under s. 91(26) of the Constitution Act, 1867.’¹⁰⁷ With reference to *Egale v Canada*, on the issue that Courts were considered to be able only to change the common law incrementally, it was held that ‘If a Court could create the rule prohibiting same-sex marriage, a Court should be able to overrule the rule.’¹⁰⁸

Many people would of course felt that it was not the place of the Court to order Parliament to make such monumental change to an institution such as marriage, which Parliament has the sole ability to legislate on. LaForme J. sought to address this issue head-on and rather brashly stated that ‘While some commentators may complain that the Divisional Court "crossed the line" and assumed a legislative function by ordering Parliament to pass legislation changing the common law, the legislators have no one to blame but themselves.’¹⁰⁹ He detailed how the legislature has avoided the issue for some time now even in spite of the recent judgements. This was this most important decision so far in the fight for same-sex relationship recognition.

Henricks & Leboeuf v Attorney General 2002

In September 2002, judgement was passed in *Henricks & Leboeuf v Att General of Quebec and Canada*. The judgement was intended for March 2002, however with the approaching introduction of Quebec’s Bill 84 the Court decided to postpone its judgement. The applicants wished the common law definition of marriage to be declared unconstitutional an inoperative since they considered it to infringe their rights’ under s.15 of the Charter. As with *Halpern* the Court eventually came to the conclusion that the opposite definition of marriage was discriminatory and could not be save by s.1 of the Charter. Also similar to *Halpern* was the Court’s decision to suspend its declaration for a period of 24 months in order to give Parliament the opportunity to remedy the problem themselves. The Attorney general felt that the opposite-sex requirement was necessary in order to promote procreation, however the

¹⁰⁷ LaForme J at p4

¹⁰⁸ *ibid* at p7

¹⁰⁹ *ibid* at p6

Court pointed out that ‘we don’t deny marriage to elderly women.’¹¹⁰ In a very short space of time two provinces, Quebec and Ontario, both have same-sex marriage almost within their grasp. The federal legislature has been used to ignoring the plight of gay and lesbian citizens for many years, however it cannot now ignore the direction of the Supreme Court of Canada.

Statistics Canada publish 2001 census 2002

On October 22nd 2002, Statistics Canada published their 2001 census. This Census was the first in Canadian history to query on the subject of same-sex relationships.¹¹¹ Around 0.5% of all couples who reported their relationships claimed to be living in a same-sex relationship. Further more around 15% of women and 3% of men living in same-sex relationships reported raising children.¹¹² The Government’s tendency to use procreation as their reason why same-sex couples should not marry is made less plausible considering these parenting figures in the Census.

Department of Justice publish discussion paper 2002

In November 2002 the Department of Justice of Canada¹¹³, most likely in a knee-jerk reaction to the current cases proceeding through the Courts, published a discussion paper on the legal recognition of same-sex couples.¹¹⁴ It explains that ‘the law seeks a balance between individual autonomy and the protection of vulnerable partners and children.’¹¹⁵

The purpose of the paper is simply to explain the current legal situation concerning same-sex union recognition, then call upon the people of Canada to express their views on how they consider the Government would best address certain issues. It asks questions such as:

- (i) whether or not marriage has a continuing role in society;
- (ii) should Government stop regulating relationships;

¹¹⁰ taken from Egale Court report September 6th 2002

¹¹¹ reported by Egale October 22nd 2002 press release

¹¹² *ibid*

¹¹³ the Department of Justice of a federal body involved in legislature and Court areas, headed by the Attorney General

¹¹⁴ marriage and legal recognition of same-sex unions, a discussion paper, department of justice Canada, November 2002

¹¹⁵ *ibid* p4

- (iii) do committed conjugal relationships other than marriage have a role in modern society;
- (iv) is there still a need for Governments to regulate marriage as distinct from other conjugal relationships.

In its final question to the public (perhaps the author was ‘breaking the reader in gently’) is whether or not people believe marriage should be open to same-sex couples by asking ‘if we want society and the law to support and respect both marriage and other committed conjugal relationships equally, how is this best achieved? Does equality mean that social institutions, like marriage, are open to same-sex conjugal partners?’¹¹⁶ It seems a little odd to have this question last and worded in such a way that it is almost asking it indirectly. Even more so since it feels the whole discussion paper is working up to asking this burning question: ‘are you against homosexuals being allowed to marry?’ Perhaps it is merely your present author’s skepticism, but it does seem to ask ‘do you want equality in our society? Are you sure? Even if it means homosexuals can join our institution of marriage?’ It seems to draw the individual’s attention to the real outcome of an equal society, as if to make them think twice about how far they really want equality to go.

It also seems odd that even after two supreme Court judgements have been passed ordering the Court to allow same-sex marriage, the Attorney General of Canada still conveys via this discussion paper that there are other options, other than opening up marriage to same-sex couples, available to Parliament.¹¹⁷ In fact the paper specifically presents the option that ‘marriage could remain an opposite-sex institution.’¹¹⁸ Perhaps the Attorney General was confident that he would prevail in an appeal of the recent decisions.

Independent poll published on public attitudes to same-sex marriage 2002

Almost simultaneously to the Department of Justice research paper was the

¹¹⁶ marriage and legal recognition of same-sex unions, a discussion paper, department of justice Canada, November 2002 p20

¹¹⁷ ibid p2 the introduction of the paper is signed by Martin Cauchon, Minister of Justice and Attorney General of Canada

¹¹⁸ ibid page 22

independent publication of a poll on public attitudes toward same sex marriage.¹¹⁹ In light of the recent Court battles it was inevitable that several calls to the public for their opinion would emerge in the form of Government discussion papers and polls sponsored by national media companies. The Government used the results as a basis for how to win votes, and the media companies use the data gathered to ascertain information about their audience. The poll concerned around 1000 Canadians selected at random from different provinces in October 2002, right in the midst of the Courtroom battles. When asked whether or not they (the respondents) wished to include same-sex couples in the definition of marriage, 45% were in favor and 47% were not.¹²⁰ The positive figure was split mostly evenly between the provinces at an average of 44%, except Quebec, where 54% of respondents were in favor. Now consider the very recent judgement in *Hendricks & Leboeuf* which would have been at the forefront of the respondents' minds when asked about the subject. Predictably, the greater acceptance of same-sex couples into the institution of marriage was in those under 25 years of age, with the percentage who opted for equality becoming lower as the respondents' ages became higher. This emphasizes the changing social constructions and tolerance of relationships in general. Perhaps as predictable (although also prejudicial on the part of your author), the higher the education of the respondent, the higher the tolerance of same-sex marriage. This could be caused by a variety of reasons. Those in higher education may be exposed to a more diverse cross-section of the population than those gaining employment from school. Those of higher learning may develop greater reasoning and tolerance to ideas alien to them. Canada also has a greater percentage in favor of same-sex marriage than the USA, but again this may have been provoked by the recent media coverage of Court cases. The question obviously arises as to whether or not this media exposure actually has a positive effect on those who were perhaps undecided on the issue. However as the supreme Court discussed 'few people want to be accused of homophobic or other politically incorrect values,'¹²¹ therefore by opening the subject up on a provincial or national level people tend to make a choice one way or the other, and as suggested very few wish to be labeled a homophobe.

¹¹⁹ CBC/EKOS Poll November 10th 2002 'Public attitudes toward same sex marriage'

¹²⁰ CBC/EKOS Poll November 10th 2002 'Public attitudes toward same sex marriage' p3

¹²¹ *Halpern v Toronto (City)* 36 R.F.L. (5th) 127

What is slightly worrying from these statistics is that in a time when public opinion is being sought by those who have the authority to make legislative changes, there is still around half of Canadians who are opposed to the idea of same-sex marriage. This is not a good figure if you are a politician working out how best to make legislative changes in order to satisfy the supreme Court and voters at the same time.

Canadian Bar Association response to Justice Department discussion paper 2003

In March 2003, the Canadian Bar Association¹²² responded directly to the November 2002 research paper on same-sex union recognition.¹²³ The Association claims that its aims are ‘improvement in the law and in the administration of justice’ and is similar to our law Society and Government Legal Service.¹²⁴ In short the CBA ‘supports the full, legal recognition of equal marriage for gays and lesbians as the only constitutionally sound position.’¹²⁵ It suggests that a federal statute be created to expressly allow same-sex couples to marry. The CBA also found that same-sex marriage is not barred by statute or common law, which begs the question of why a statute permitting same-sex couples to marry is needed. Mostly likely it is intended as a definite clarification of this troublesome area of law. They state that ‘extension of marriage to same-sex couples is inevitable.’¹²⁶

Egale v Canada (Attorney General) 2003

Judgement the appeal case of *Egale v Canada (Attorney General)*¹²⁷ which came to Court early 2003, was given on the 1st May 2003. This case was appealed after a Superior Court judgement in 2001 held that there was a common law bar on marriage which prohibited same-sex couples from entering the institutional. However, although Pitfield J. held that the bar was an infringement of the petitioners’ rights under s.15 of the Charter, he also declared it to be saved by s.1. On appeal the Honourable Madam Justice Prowse held that the Superior Court judge had been correct in establishing that s.15 breach, however she felt that it was not justified and

¹²² Submission on marriage and the legal recognition of same sex unions, Canadian Bar Association, march 2003

¹²³ marriage and legal recognition of same-sex unions, a discussion paper, department of justice Canada, November 2002

¹²⁴ Submission on marriage and the legal recognition of same sex unions, Canadian Bar Association, march 2003 p(i)

¹²⁵ *ibid* p1

¹²⁶ *ibid* p21

¹²⁷ 2003 BCCA 251

saved by s.1. As discussed in the section on the earlier Superior Court case, the Attorney General had presented the argument that the opposite-sex requirement was in order to provide for necessary procreation. However Prowse J. felt that ‘permitting same-sex couples to marry would not diminish the procreative potential for marriage.’¹²⁸ Taking into account the judgements in Halpern and Hendricks she felt that the bar to marriage could not be save by s.1 and ordered that the definition at common law be changed to ‘the lawful union of two persons to the exclusion of all others.’¹²⁹ As in Hendricks and Halpern, the Court gave the federal and provincial legislatures until July 2004 to remedy the problem via the correct legislative channels.¹³⁰

Halpern v Attorney General 2003

Only a month after the landmark Egale case, the 2002 judgement in Halpern v Attorney General was appealed.¹³¹ In this case the Attorney General of Canada had appealed the divisional Court’s decision that the existing definition of marriage was a breach of equality under the Charter, and the couples simultaneously cross-appealed the remedy offered by the Court. The annotation to the case refers to the divisional Courts order to allow immediate marriage as ‘short-sighted and smacks of judicial muscle-flexing. In the end, this case is an exercise of symbolism’¹³² Although it was considered in the annotation that the divisional Court was placed in a difficult position since ‘as it is, the legislators can safely avoid any controversial decision, secure in the knowledge that an aggrieved person will litigate and a Court will decide the issue for them.’¹³³ This is true since it is ‘better a large portion of the public is angry at a handful of judges than that they vote the Government out of power over a controversial decision.’¹³⁴

Also, since judgements are of a personal nature ‘judges are not immune to public reaction to their decisions. Few people want to be accused of homophobic or other

¹²⁸ ibid p3

¹²⁹ ibid para 7

¹³⁰ although only to July 2004 (but this is to coincide with the date ordered in Halpern)

¹³¹ Halpern v Toronto (City) 36 R.F.L (5th) 127

¹³² ibid p3 annotation by James G. McLeod

¹³³ ibid p4

¹³⁴ ibid p5

politically incorrect values.’¹³⁵ This statement demonstrates the pressure felt by the judiciary due to the lack of action by Parliament and the legislature.

The Court dismissed the Attorney Generals appeal that the common law should be merely declared invalid in order to allow Parliament to respond by stating that ‘a declaration of invalidity alone fails to meet the Court’s obligation to reformulate a common law rule that breaches a *Charter* right.’¹³⁶ Further more that ‘there is no evidence before this Court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage.’¹³⁷ For these reasons the Court held that the reformulated definition should have immediate effect. The reformulated definition now reads ‘the voluntary union for life of two persons to the exclusion of all others.’¹³⁸ The Court also ordered the City Clerk for Ontario to issue marriage licenses to the appellants, and that the Registrar General must accept the marriage certificates of those already married by the MCCT church. The main point which differentiates Halpern from Egale and Hendricks is that the declaration in Halpern had immediate effect which meant that same-sex couples could marry straight away.

Egale v Canada 2003

Immediately following this judgement the suspension on the declaration in Egale v Canada was appealed. Bearing in mind that Prowse J. had set the date of suspension so that it would coincide with that of Halpern, it would seem logical that the Court would also lift the suspension of declaration in Egale. The Court decided that the in both cases the issues and decisions were sufficiently similar to consider lifting the suspension. Particular attention was paid to the fact that the Attorney General had consented to the applications and therefore the suspension was no longer required, and that it would be an unequal application of the law to allow couples to marry in Ontario whilst maintaining the ban in B.C. The Court therefore ordered that the suspension be lifted and that the common law definition of ‘the lawful union of two persons to the exclusion of all others’ should have immediate effect.¹³⁹

¹³⁵ *ibid* p4

¹³⁶ *ibid* p34

¹³⁷ Halpern v Toronto (City) 36 R.F.L (5th) 127 p153

¹³⁸ *ibid* para 154

¹³⁹ Egale v Canada 2003 BCCA 406

Attorney General of Canada issues Factum regarding capacity to marry 2003

In light of the judgements in Halpern and Egale which have recently allowed same-sex couples to marry, the Attorney General for Canada issued a factum regarding same-sex capacity to marry. It details that the federal Government wished propose a federal law which would have the affect of extending the capacity to marry to same-sex couples all over Canada. This factum was at the request of the Governor in Council on the 16th July 2003, asking to hear a reference on the proposed legislation¹⁴⁰ in light of the recent Court cases. The Attorney General focused his attention on the constitutionality of a change in the definition of marriage. As previously discussed, Parliament is given power to make changes to ‘marriage and divorce’ by virtue of the Constitution Act 1867.¹⁴¹ In particular to the issue, three questions were proposed:

- (i) is the proposed act within the legislative authority of Parliament;
- (ii) if yes to (i), then is s.1 of the proposed act consistent with the Charter;
- (iii) does s.2(a) of the Charter protect religious officials from performing marriages contrary to their religious beliefs.¹⁴²

In answering question (i) it was held that s.91(26) should be given a purposive and progressive interpretation. Therefore, although when the Constitution Act was drafted it would not have taken into account same-sex couples,¹⁴³ it must be interpreted in a manner suited to current social climates. For these reasons the Attorney General felt that question (i) should be answered in the positive.

In light of question (ii) he admitted that he did not know what challenges were likely to come from the proposed legislation, but still considered it to be consisted with the Charter and therefore question (ii) should also be answered in the positive. He also came to the conclusion that s.2 of the Charter offered sufficient protection to religious officials and that in which case all questions had been answered in the positive. Therefore it was considered that the proposed legislation was constitutional.

Independent poll on definition of marriage published 2003

¹⁴⁰ Proposal for an Act representing certain aspects of legal capacity for marriage for civil purposes

¹⁴¹ s.91(26)

¹⁴² Factum of AGC Court file no. 29866

¹⁴³ confirmed in *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 where it was held that same-sex relationships had not reached adequate usage in language to be considered ‘family status’

In another independent poll, this time on public opinion of the definition of marriage, was published in September 2003.¹⁴⁴ This poll was in response to the aforementioned federal proposals to change the definition of marriage to include same-sex couples. It explains that the Canadian public seem to be evenly divided on the subject. Only 37% were in favour of including same-sex couples in the definition of marriage, with the exact same percentage wanting a separate institution for same-sex couples which conferred the same rights as marriage.¹⁴⁵ However, 32% of Canadians surveyed felt that allowing same-sex couples to marry was a threat to the institution. It was also demonstrated that while 60% Canadians under 35 support the change in definition, the same percentage in those over 65 oppose it.¹⁴⁶ On the matter of the Charter the poll found that 48% of those surveyed felt that the Courts had too much power, which would certainly explain the Courts caution in giving judgements such as in Halpern and Egale immediate effect instead of allowing Parliament an opportunity to respond. While it is helpful to the campaign for same-sex marriage that around half of the Canadian public support it, it is equally harmful that the other half do not. However, in the final months of the battle for same-sex marriage, the campaigners now have the powers of the judiciary on their side, which has proven to be a very powerful ally in recent times.

Toronto publish marriage statistics following Halpern 2003

On October 1st 2003, the Legislative Department of the City of Toronto published its marriage statistics for the summer of 2003.¹⁴⁷ Since the Halpern judgement around 13% of all marriage licenses issued were for same-sex couples. This figure is considerably larger than the Census figures which state that only 0.5% of Canadians are in same-sex relationships,¹⁴⁸ but this surge is understandable since many same-sex couples had been waiting for their opportunity to marry for quite some time.

Canadian Alliance Party seek to keep same-sex couples from marrying 2003

¹⁴⁴ sponsored by NFO CFgroup

¹⁴⁵ Public Opinion on definition of marriage poll, September 2003 sponsored by NFO CFgroup

¹⁴⁶ ibid p4

¹⁴⁷ the statistics were between June 10th to July the 15th, immediately after the Halpern judgement, provided to McGowan, Elliot and Kim solicitors

¹⁴⁸ Statistics Canada Census 2001

Later in October the same-sex issue was raised once more in Parliament.¹⁴⁹ The Canadian Alliance Party¹⁵⁰ had brought forward a motion to encourage Parliament to use the ‘notwithstanding’ clause in order to exclude same-sex couples from marrying. In true reflection of the public opinion poll previously mentioned, the motion was very evenly split with it being narrowly defeated at just 137 to 132. Following this defeat the Alliance sought to introduce a private members bill which is of an anti-same-sex marriage nature in a further display of anger at the proposed federal legislation allowing same-sex marriage.

¹⁴⁹ reported by Egale October 4th 2003

¹⁵⁰ this was the 2nd largest party in Parliament between 2000-2003, it was very right wing, in November 2003 MP Larry Spencer of the party stated that he felt homosexuality should be ‘outlawed’

Chapter 7

The Means to an End

Hendricks & Leboeuf.....the final chapter

In what appears to be the most important decision yet, the final instalment of the Hendricks & Leboeuf saga,¹⁵¹ much of the proceedings considered the principle of res judicata. Should the Court find that this principle exists, then it would effectively open up same-sex marriage across Canada without need for further litigation. The Catholic league for human rights was granted intervener status on the basis that it had sufficient interest in the case. However, in order to understand this case we must first look at the existing legal stance. In the previous Hendricks judgement the declaration, which would in effect permit same-sex marriage, was suspended for 24 months in order to allow Parliament to amend the existing law itself. Through the voice of the Attorney General the federal Government had defended the constitutionality of a rule of law under federal jurisdiction. Under the notion of res judicata in public law, certain criteria must have been satisfied in order for res judicata to have effect;

- (i) the judicial debate must implicate the Government
- (ii) a declaration of unconstitutionality must be pronounced by a competent Court
- (iii) there must be an absence of appeal of the judgement.

Since the Attorney general is acting on behalf of the federal Government, part (i) is satisfied. Part (ii) also since the Supreme Court is competent in such matters. The fact that the Attorney General knowingly did not seek to appeal the decisions which declared the definition of marriage invalid, means that part (iii) is satisfied. Since the federal rule of law relating to capacity to marry has already been declared invalid by the Supreme Court in two provinces, this presents the issue of res judicata clearly. Even if it were considered that judgements in one province do not have extra-territorial effects it would still be 'judicially unacceptable that, in a constitutional matter involving the Attorney General of Canada with regards to a matter within the jurisdiction of the federal Parliament, a provision be inapplicable in one province and

¹⁵¹ Quebec Court of Appeal March 19th 2004, translated version 2004 CarswellQue 496

in force in all others.’¹⁵² However, since the Attorney General did not appeal the decisions, there is no longer litigation between the original parties, which creates a slightly unusual situation. Technically, since the Attorney General is no longer defending the rule of law, it is a private party who is seeking to pursue the debate and maintain the validity of the traditional definition of marriage.¹⁵³ In addition to this the private party wishes to pursue the debate on a question identical to one heard in the Superior Court.

The respondents presented two arguments in an attempt to persuade the Court to quash the appeal. Firstly they considered that the appellant did not have sufficient interest in the matter to act as intervener. Secondly they felt that in light of the Halpern and Egale judgements, the appeal is simply theoretical. In order to qualify as an intervener, the Court must consider that there is:

- (i) a serious issue
- (ii) a genuine interest
- (iii) the absence of other efficient means to bring the matter before the Court.

The Court felt that although part (i) had been satisfied, the appellant had not demonstrated that its ‘particular interest is sufficient to be substituted to the interest of the whole of the society represented by the Attorney General.’¹⁵⁴ The Court also felt that part (iii) was not satisfied since the reference already presented to the Court was a more reasonable and efficient manner to submit the question. For these reasons the Court did not feel that the intervener status was sufficient to allow the Court to proceed, and therefore dismissed the appeal.

By cross-appeal the respondents wished that the suspension on the declaration made by the previous Court be quashed, and that the definition ‘two persons’ have immediate effect. In January 2004 the solicitor for the Attorney General wrote that he did not wish for the period of suspension to continue.¹⁵⁵ The Court therefore held that in these circumstances it would be appropriate to bring the period of suspension to an end and that the new definition should have immediate effect. In a final statement the

¹⁵² Quebec Court of Appeal March 19th 2004, translated version 2004 CarswellQue 496 para28

¹⁵³ ibid para29

¹⁵⁴ 2004 CarswellQue 496 2004

¹⁵⁵ 2004 CarswellQue 496 para52

Court held that ‘given the declarations of invalidity, there are no obstacles remaining to having a qualified officer perform the marriage ceremony of the respondents, and the order requested by the respondents in this regard will be delivered.’¹⁵⁶ This has the effect of allowing same-sex couples to marry in Quebec, and given the res judicata issue raised, means that same-sex marriage is technically legal throughout Canada, although the actual effects are yet to be seen.

Conclusion

As we have seen, the road to same-sex union recognition and eventually marriage has been a lengthy one in the eyes of the campaigners, but relatively quick in legal terms since most important judgements have occurred in the last 10 years or so. The challenge of the institution of marriage in *Layland & Beaulne* in 1993 represented the beginning of the journey, while in *Egan v Canada* 1995 it became obvious that the Charter would become the actual vehicle to equality. It was also in this case that the Courts first acknowledged that discrimination of same-sex couples actually existed. *M v H* represented a real turning point due to the fact that it was considered that same-sex discrimination in relation to the Family Law Act could not be justified and therefore saved by s.1 of the Charter. From this point it appeared that provincial Governments had no direction to go other than to amend their existing offending legislation, and sure enough it did gradually change to recognise same-sex couples under the term ‘spouse’. After the introduction of Federal Bill C-23 and the likes of Bill 84 in Quebec, it appeared that the battle for same-sex rights and obligations had been all but won. Although they were still not included as equals with opposite-sex couples, they at least could have access to the same benefits and obligations.

This left the one remaining goal which had been in the forefront of all campaigners’ minds...marriage. In 2002, Ontario became the first province to allow same-sex marriage in theory after the judgement in *Halpern*. This was followed closely by British Columbia after it was held that the definition of marriage must also be changed. However, the effects of these cases was not immediate since both

¹⁵⁶ *ibid* para56

suspended their declarations in order to allow Parliament time to rectify the law themselves.

However, the campaigners were not to wait as long as the first though since Halpern was appealed and the Court ordered immediate effect of their declaration. After the judgement, same-sex couples began to marry straight away in Ontario, the first province to legalise marriage.

Ontario was followed closely by British Columbia when Egale was appealed and the suspension lifted also. This mean that should the appeal in Hendricks & Lebouef be successful, over 75% of Canada would allow same-sex marriage.

On March 19th 2004 the campaigners in Quebec heard the news they had been waiting for...that same-sex marriage was now legal in all three of Canada's largest provinces. As an added bonus the Court also considered that the principle of res judicata applied and that technically same-sex marriage should be legal throughout the whole of Canada.

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